PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING DIRECTIVES 2009/102/EC AND (EU) 2017/1132 AS REGARDS FURTHER EXPANDING AND UPGRADING THE USE OF DIGITAL TOOLS AND PROCESSES IN COMPANY LAW – TRUST, TRANSPARENCY AND EASIER CROSS-BORDER EXPANSION FOR COMPANIES

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Abstract

Digital tools are essential to ensure the continuity of business operations and of companies' interactions with business registers and authorities. The need to enhance trust and transparency in the business environment and to facilitate the operations of companies, in particular micro, small and medium-sized enterprises (SMEs) in the single market , was underlined since 2003 in Commission Recommendation 2003/361/EC[1]. As a consequence, in this digital era it is crucial to ensure access for companies, authorities and other stakeholders to reliable company information that can be used without burdensome formalities in a cross-border context. In response to developments in the digital environment, Directive (EU) 2017/1132[2] was amended by Directive (EU) 2019/1151 of the European Parliament and of the Council[3] introducing rules for carrying out the following operations entirely online: incorporation of public limited liability companies, registration of cross-border branches and submission of documents to business registers. A new step is taken now with the Proposal for a Directive of the European Parliament and of the Council amending Directives 2009/102/EC and (EU) 2017/1132 as regards further expanding and upgrading the use of digital tools and processes in company law[4]. The new initiative complements Directive (EU) 2019/1151 focusing on additional segments where digitalisation could improve EU company law, by addressing the availability and reliability of company information in business registers and BRIS, and its use in cross-border situations.

Keywords: *digitalization of EU company law, trust, availability of company information, interconnection of registers, transparency on companies, once only principle*

1. Introduction in the context of the proposal

On 29 March 2023, the European Commission proposed a new legislative intervention in the area of company law, namely the Proposal for a Directive amending Directive 2009/102/EC and Directive (EU) 2017/1132 as regards further extending and modernising the use of digital tools and processes in company law.

As announced in the Commission's Work programme for 2023, the initiative is one of the key actions under the policy priority „Europe fit for the digital age". The proposal will directly contribute to the objectives for the implementation of digital processes set out in the 2021 Commission Communication „2030 Digital Compass: Europe's way to the digital decade"[5], which stressed the importance of delivering key solutions for online public services to European citizens and businesses (with the objective of making 100% of these services available online by 2030) and of creating connected public administrations, including through the application of the "once only" principle. In addition, it will support the achievement of the 2020 Communication on the digitalisation of justice

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[1] Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (text with EEA relevance) (notified under document number C(2003) 1422), OJ L 124, 20.05.2003, p. 36-41.

[2] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification), OJ L 169, 30.06.2017, p. 46-127.

[3] Directive (EU) 2019/1151 of the European Parliament and of the Council of 20.06.2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law, OJ L 186, 11.07.2019, p. 80-104.

[4] COM/2023/177 final available at *EUR-Lex - 52023PC0177 - EN - EUR-Lex (europa.eu).*

[5] COM(2021) 118 final.

in the European Union,[6] which stressed the importance of introducing appropriate tools for judicial authorities and professionals to facilitate the cross-border exchange of documents. Last but not least, it will respond to the directions set out in the 2020 „SME Strategy for a sustainable and digital Europe"[7] and the Communication „Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery"[8], the latter policy document envisaging the Commission's assessment of the need to introduce additional corporate measures to facilitate cross-border expansion of SMEs. The proposal builds on BRIS (Business Register Interconnection System) and extends its use without changing its functioning or infrastructure. It will also link BRIS with other register interconnection systems at EU level.

2. Impact assessment considerations

The impact assessment identified the following problems requiring legislative intervention: low volume of available company data provided by national registers/BRIS; difficulties in using existing data directly for cross-border activities (including in administrative and judicial proceedings and in the process of setting up cross-border subsidiaries or branches). The causes of these dysfunctions can be grouped into several categories: some company data are not available due to different policies applied by Member States in providing them; the control procedures set up by Member States for the verification of information recorded in business registers differ, making the data subsequently provided to the public unreliable; the maintenance of excessive formalities (legalisation, translations, apostille); insufficient application of the *once only* principle. The objectives of the proposal are therefore to improve transparency and confidence in the business environment in the single market; to increase the level of digitisation of cross-border public services for businesses; to reduce the administrative burden for businesses operating across borders, especially SMEs.

3. Summary of the architecture of the legislative proposal

It should be pointed out *ab initio* that, in order to achieve the objectives pursued, the legal basis of the proposal combines art. 50 para. (1) and (2) TFEU, already enshrined by the European legislator for interventions in the field of company law, with art. 114 para. (1) TFEU, which is specific to the establishment and functioning of the internal market.

In terms of tackling the administrative burden faced by companies across borders, the legislative intervention is noteworthy, by proposing:

- the application of the „once only" principle, so that companies do not have to provide information/documents again when setting up a branch or a subsidiary in another Member States (an important role in the exchange of information foreseen by the proposal will be played by BRIS);
- the introduction of an EU company certificate (will include a basic set of information and will be available in all EU languages);
- the establishment of a standard multilingual EU digital power of attorney which will allow the company to be represented in all Member States (it should be clarified that this power of attorney is drawn up/revoked according to national law);
- elimination of additional formalities such as the requirement to have documents legalised or translated.

In order to increase the transparency of information, it is proposed:

- ensuring that important information on companies (*e.g.*, on groups of companies) is made publicly available, in particular at EU level, through BRIS;
- facilitating searches for information on EU companies, through access to BRIS and, at the same time, through two other EU systems that would be interconnected, namely national registers of beneficial owners and insolvency registers;
- ensuring that data on companies in business registers are accurate, reliable and up-to-date (the provisions of the proposal foresee the introduction at Member States level of a mechanism for preventive administrative or judicial control of instruments of incorporation and amending acts, respectively, prior to entry

[6] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Digitalisation of justice in the European Union A toolbox of opportunities, COM/2020/710 final, available at *EUR-Lex - 52020DC0710 - EN - EUR-Lex (europa.eu)*.

[7] COM (2020) 103 final, available at *EUR-Lex - 52020DC0103 - EN - EUR-Lex (europa.eu)*.

[8] COM/2021/350 final, available at *EUR-Lex - 52021DC0350 - EN - EUR-Lex (europa.eu)*.

in the registers).

We also note the introduction of Annex IIB to Directive (EU) 2017/1132 (in the case of Romania, the annex includes general partnerships and limited partnerships).

This proposal complements the rules of Directive (EU) 2017/1132 (Codification) by extending its provisions. It is recalled that Directive (EU) 2019/1151 („the Digitalisation Directive") enshrined the first steps to ensure that the procedures for registration and amendment of documents registered in the commercial register are carried out entirely online for certain types of companies and their branches. The text launched complements that Directive, but also focuses on other aspects of EU company law where digitalisation is needed, in particular by addressing the availability and reliability of company information in business registers and BRIS and its use in cross-border situations. The initiative is also complementary to other EU rules aimed at increasing transparency in relation to companies. These include the Anti-Money Laundering Directive, which focuses on beneficial ownership information, or the Insolvency Regulation, which focuses on information about entities available in insolvency registers, the initiative aiming to link BRIS with the system of interconnection of registers of beneficial owners (BORIS) and the system of interconnection of insolvency registers (IRI), without changing or circumventing the rules on access to information available in those interconnections and the limits of such access.

4. Preliminary point-by-point analysis of the proposal

It should be noted at the outset of the analysis that most of the new provisions amend or add to the provisions of Directive (EU) 2017/1132 (Codification), with all references in the present presentation being made to the latter text (with an exception concerning the amendment regarding art. 3 of Directive 2009/102/EC[9]). As indicated in the section on the summary presentation of the legislative proposal, the initiative aims to retain new obligations that will ensure a higher level of transparency of the information available through national registers. Recital 15 of the proposal emphasises, in detailing the operative part of the rule, the need to facilitate access to partnerships, with the disclosure requirements applicable to companies in which the members/shareholders are liable up to the limit of the share capital being adapted to the specific characteristics of this type of company (art. 14a, 18, 19a). The initiative also introduces new sets of information to be published in commercial registers and made available through BRIS (place of central administration and principal place of business, where these are established in other Member State than that in which the registered office of the company is registered - Art.14(l) and (m); data concerning the group of companies - art. 14b). It also replaces art. 3 of the Directive 2009/102/EC in order to apply higher transparency requirements to single-member companies. According to the new text, where a company becomes a single-member company because all its shares are acquired by a single person, an indication of this fact and the identity of the sole member must be recorded in the file or register referred to in art. 3 para. (1) and (2) of Directive 68/151/EEC[10] and made available to the public through the system of interconnection of registers referred to in art. 16 para. (1) of Directive (EU) 2017/1132. According to the new architecture of art. 18 para. (3) of Directive (EU) 2017/1132, Member States shall ensure that the forenames, surnames and date of birth of the persons referred to in art. 3 of Directive 2009/102/EC are made available to the public through the system of interconnection of business registers. It is considered in the context of the new transparency obligations that BRIS should be linked to the EU BORIS established by Directive (EU) 2015/849 as amended by Directive (EU) 2018/843[11], which connects national central registers containing information on beneficial owners of companies and other legal entities, trusts and other legal arrangements, as well as to the EU IRI established in accordance with Regulation (EU) 2015/848[12]. The EUID should be used to link information on a particular company between these systems. As stated in the preamble of the proposal, such

[9] Directive 2009/102/EC of the European Parliament and of the Council of 16.09.2009 in the area of company law on single-member private limited liability companies (Codified version), OJ L 258, 01.10.2009, p. 20-25.

[10] First Council Directive 68/151/EEC of 09.03.1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of art. 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, repealed by the Directive 2009/101/EC of the European Parliament and of the Council of 16.09.2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of art. 48 of the Treaty, repealed by the Directive (EU) 2017/1132.

[11] Directive (EU) 2018/843 of the European Parliament and of the Council of 30.05.2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, OJ L 156, 19.06.2018.

[12] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20.05.2015 on insolvency proceedings (recast), OJ L 141, 5.6.2015, p. 19-72.

linking of information between systems should not affect the rules and requirements on access to information laid down in the relevant frameworks establishing these registers and interconnections. The clarification is welcomed in the light of CJEU case law which found the provision in the Anti-Money Laundering Directive, which requires Member States to ensure that information on the beneficial ownership of corporate and other legal entities registered in their territory is accessible in all cases to any member of the general public in relation to the Charter, to be invalid (Judgment of the Court of 22.11.2022 in Joined Cases *C-37/20 WM and C-601/20 Sovim SA v. Luxembourg Business Registers*[13]).

Another strand of the proposal is designed to ensure reliable and trustworthy data on which businesses, stakeholders and authorities can rely when they need it for commercial purposes or in administrative or judicial proceedings. To achieve this, it is proposed to ensure at Union level a preventive judicial or administrative control by checking the legality of the company's instrument of incorporation, of the company statutes, if they are contained in a separate document, and of any amendment to such instruments and statutes. The new art. 10 of Directive (EU) 2017/1132 provides in para. (2) that the legality check shall at least verify that: a) the formal requirements for the instrument of incorporation (and for the statutes, if they are included in a separate document) are met, and that the forms referred to in art. 13h are used correctly, b) the minimum mandatory content is included, c) there are no obvious material legal irregularities, and d) the contribution required under national law has been paid, whether in cash or in kind. Beyond the common standards that will characterise this ex-ante verification, it is imperative, in order to achieve the proposed objective, that the information on companies in business registers is accurate. This objective is not a new element, as the Financial Action Task Force Recommendation no. 24 on „Transparency and Beneficial Ownership of Legal Entities"[14], as revised in March 2022, includes requirements that the information on companies in business registers should be accurate and up-to-date. As a consequence, the new text of art. 15 para. (1) requires Member States to put in place procedures to ensure that the information on companies listed in Annexes II and IIB stored in the registers referred to in art. 16 is kept up to date. According to para. (2), these procedures must provide, as a minimum, for the filing with the register of amendments to documents and particulars within a period not exceeding 15 working days from the date on which the amendments were made (by way of exception this provision does not apply to groups of companies and accounting documents) and that any amendment to documents and particulars relating to companies listed in Annexes II and IIB to be entered in the register and published, in accordance with art. 16 para. (3), within 5 working days of the date on which all the formalities required for filing are completed. Companies listed in the Annexes will be required to confirm annually that the information in the register relating to those companies is up to date.

A final direction of legislative intervention, building on the results of the previous directions, is the possibility of direct cross-border use of company data from business registers in cross-border situations. The preferred policy option, as also stated in the explanatory memorandum of the proposal, consolidates three actions, namely the use of the 'once only' principle for the establishment of subsidiaries or branches in another Member State, the provision of a harmonised extract of companies in the EU and, last but not least, ensuring mutual recognition of certain company data by eliminating certain formalities (apostille). As regards the harmonised extract concerning a company (company certificate), it will be possible to use it at EU level, including in administrative procedures applied by national authorities and in judicial procedures carried out in other Member States or applied by EU institutions and bodies. The document will also be issued in electronic format and will be authenticated using the trust services referred to in Regulation (EU) no. 910/2014[15] and will also be compatible with the European digital identity wallet referred to in the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) no. 910/2014 as regards the establishment of a framework for the European digital identity[16] (art. 16). According to art. 16b(1), the EU company certificate must be accepted in all Member States as conclusive evidence of the establishment of the company concerned and of the information contained therein which is held by the register in which that company is registered at the date of issue of the certificate. Concerning the application of the „once only" principle (according to which companies should not be required to submit the same information more than once), we will not insist in particular, as the

[13] ECLI:EU:C:2022:912, *https://curia.europa.eu*.

[14] FATF Guidance on Beneficial Ownership Recommendation 24 - Public Consultation (*fatf-gafi.org*).

[15] Regulation (EU) no. 910/2014 of the European Parliament and of the Council of 23.07.2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, OJ L 257, 28.8.2014, p. 73-114.

[16] COM/2021/281 final, available at *EUR-Lex - 52021PC0281 - EN - EUR-Lex (europa.eu)*.

aim of reducing in cross-border situations the overall administrative burden for companies and other stakeholders is obvious (art. 13g is amended to include this principle).A final action of this policy option is indicated as reducing the formalities that hinder the use of documents in cross-border cases. In this respect, the new art. 16d requires Member States to ensure that copies and extracts of documents or information supplied and certified copies supplied by business registers, as well as notarial and administrative documents and certified copies thereof, and certified translations thereof, are exempt from any form of legalisation or other similar formality, as long as they meet certain minimum requirements as to the origin of the document.The legal requirements for certified translations of the instrument of incorporation and similarly of other documents supplied by the business register, according to Recital 28 and art. 16f, should be limited to what is strictly necessary and the obligation to have such a translation should be allowed only in specific cases, such as where the certified translation is required in the context of court proceedings. Of course, the proposal also enshrines safeguards in the event of reasonable doubts on the part of the authorities of another Member State as to the origin and authenticity of documents, including as to the identity of the seal or stamp, or in cases where they have reason to believe that the document has been forged or fraudulently manipulated (art. 16). In such cases, these authorities may send a request for information to the register which supplied these copies and extracts of documents or to the register of the Member State of the authority to which the copies and extracts of documents and information have been submitted (verification will be carried out through the register interconnection system).

A particular element in the context of the proposed Directive is the Union-wide power of attorney (art. 16c), usable in cross-border proceedings in the context of Directive 2017/1132. The power of attorney is drawn up and revoked in accordance with national law (according to art. 16c para. 1 subpara. 2, national requirements include at least verification of identity, legal capacity and power to represent the company in the case of the person granting the power of attorney), but will have a standard multilingual template and a minimum mandatory content. It will be filed with the commercial register where the company is registered, and third parties with a legitimate interest will have access to it. The power of attorney will only work in digital format and will be authenticated using trust services as defined by Regulation (EU) no. 910/2014. As clarified in recital 26, in order to overcome language barriers and facilitate use, a model Union company certificate and a standard digital power of attorney template will be available on the e-Justice Portal in all official EU languages.

A special provision, to which we reserve a special place, is art. 14b, which is devoted to information on groups of companies. According to recital 17, this type of information promotes transparency, increases confidence in the business environment and has the potential to help identify fraudulent or abusive schemes that could affect public revenues and the credibility of the single market. Therefore, as outlined in the preamble, information on group structures should be published in business registers for both national and cross-border groups and made available through the BRIS system (recital 21 refers also the need for a visual representation of the group structure based on the chain of custody to be made available through the interlinked registers system. The technical details and the detailed list of data for the visual representation of the group structure referred to in art. 14b(10) are to be established by implementing acts as specified in the new text of art. 24. Article 14b sets out in detail the procedure for the publication of this type of information in the registers, with the publication requirement to be met by both the ultimate parent company established in the EU and the subsidiary. If the ultimate parent company is established outside the EU, then the EU intermediate parent company should meet the relevant disclosure requirement. If no intermediate parent company is subject to the law of a Member State, the subsidiary which is subject to the law of a Member State will publish the information. The ultimate EU parent or EU intermediate parent or subsidiary must disclose information on the EU and non-EU subsidiaries of the group. According to art. 14b(1), the set of information on the group will include: (a) the name and legal form of each subsidiary; (b) the Member State or third country in which each subsidiary is registered and its registration number; (c) the EUID of each subsidiary undertaking governed by the law of a Member State; (d) the name of the group, if different from the name of the ultimate parent company; (e) the position of each subsidiary undertaking in the group structure, determined on the basis of control. In order to facilitate rapid communication between registers, paragraph 5 of that rule requires Member States to ensure that, where the ultimate parent company governed by the law of a Member State or, where applicable, the intermediate parent company is registered in a Member State other than any of the subsidiaries, the register in which the ultimate parent company or, where applicable, the intermediate parent company is registered shall send the necessary information to the register corresponding to each subsidiary registered in another Member State via the system

of interconnection of registers. According to the definitions introduced by the proposal in art. 13a (points 9 and 10), 'ultimate parent company' means a parent company which controls, directly or indirectly, in accordance with the criteria laid down in art. 22 para. (1) to (5) of Directive 2013/34/EU one or more subsidiaries and which is not controlled by another company, 'intermediate parent company' being a parent company governed by the law of a Member State and which is not controlled by another company governed by the law of a Member State.

5. Conclusions

The legislative proposal represents an ambitious step in the modernisation of EU company law, and the objectives pursued are, at least in theory, to be welcomed. As positive aspects with unproblematic potential to be achieved, one can note the newly introduced requirements regarding the improvement of transparency of company data and implicitly the extension of the data available in BRIS. Also, the interconnection of registers (BORIS, IRI, BRIS) is a logical sequential step, after their creation and stabilisation, being useful to facilitate the correlation of information on the evolution of the company during its operation. In addition, the possibility of cross-border use of company information (introduction of the *once only* principle for setting up cross-border subsidiaries and branches, establishment of a common company register and abolition of legalisation formalities) will undoubtedly facilitate cross-border economic activities and the access to the markets of other Member States.

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